

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARVIN BARRIOS-SOCOP,

Defendant.

NO: CR-12-2006-RMP

ORDER DENYING DEFENDANT'S  
28 U.S.C. § 2255 MOTION AND  
DENYING DEFENDANT'S  
MOTION FOR CLEMENCY

Before the Court is Defendant Marvin Barrios-Socop's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255, ECF No. 46, and motion for commutation of sentence, ECF No. 48. The Court has reviewed the motions, the judgment, all other relevant filings, and is fully informed.

**BACKGROUND**

On March 8, 2012, Mr. Barrios-Socop pleaded guilty to one count of being an alien in the United States after deportation. ECF Nos. 25, 26. In his plea agreement, Mr. Barrios-Socop expressly waived his right to appeal the sentence he received. ECF No. 26 at 10. Mr. Barrios-Socop further waived his right to bring a

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1 motion pursuant to 28 U.S.C. § 2255, except a motion “based on ineffective  
2 assistance of counsel, should new information come into his possession subsequent  
3 to the signing of” the plea agreement. ECF No. 26 at 10. Mr. Barrios-Socop was  
4 sentenced to 30 months of incarceration, a sentence below the United States  
5 Sentencing Guidelines advisory range. ECF No. 43.

6 Mr. Barrios-Socop comes now and challenges his sentence by way of 28  
7 U.S.C. § 2255 on the grounds that (1) he received ineffective assistance of counsel;  
8 and (2) his conviction is not supported by substantial evidence. ECF No. 46. Mr.  
9 Barrios-Socop has also petitioned the court for commutation of his sentence,  
10 arguing that if he were released, he would return to Guatemala and never revisit the  
11 United States.

## 12 DISCUSSION

### 13 Defendant’s Section 2255 Motion

14 As an initial matter, Mr. Barrios-Socop’s plea agreement contains a  
15 provision waiving his right to bring a motion under § 2255 challenging his  
16 conviction. Nothing precludes a defendant from waiving the statutory right to file  
17 a § 2255 petition challenging the length of his sentence. *United States v. Navarro-*  
18 *Botello*, 912 F.2d 318, 321 (9th Cir. 1990); *United States v. Cope*, 527 F.3d 944,  
19 949 (9th Cir. 2008). Such a waiver is enforceable if ““(1) the language of the  
20 waiver encompasses [the defendant’s] right to appeal on the grounds raised, and

1 (2) the waiver is knowingly and voluntarily made.” *United States v. Leniear*, 574  
2 F.3d 668, 672 (9th Cir. 2009) (quoting *United States v. Speelman*, 431 F.3d 1226,  
3 1229 (9th Cir. 2005)); *see also Abney v. United States*, 431 U.S. 651, 656 (1997)  
4 (“[T]here is no constitutional right to appeal.”).

5 Waiver of appeal rights does not “categorically foreclose” all § 2255  
6 proceedings, “such as a claim of ineffective assistance of counsel or  
7 involuntariness of waiver.” *United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir.  
8 1993); *see also Washington v. Lampert*, 422 F.3d 864, 870 (9th Cir. 2005).  
9 Generally, however, an express waiver of a statutory right, including § 2255  
10 petitions, bars the defendant from moving the sentencing court to vacate, set aside,  
11 or correct the sentence. *Abarca*, 985 F.2d at 1014.

12 Mr. Barrios-Socop raises two arguments in support of his 2255 motion: (1)  
13 there is insufficient evidence to support a guilty finding; and (2) he received  
14 ineffective assistance of counsel. Mr. Barrios-Socop fails to explain why this  
15 Court should reach the merits of his insufficient evidence argument despite the  
16 waiver of his right to bring a 2255 motion on grounds other than ineffective  
17 assistance of counsel. On that ground alone the Court could rule against Mr.  
18 Barrios-Socop on the sufficiency issue.

19 Even if the Court were to reach the merits of the sufficiency question, Mr.  
20 Barrios-Socop would not be entitled to relief. To be found guilty of being an alien

1 in the United States after deportation, the Government must prove (1) that the  
2 defendant was deported from the United States; (2) that the defendant thereafter  
3 voluntarily reentered the United States; (3) at the time and after the defendant  
4 entered the United States, he knew he was in the United States and knowingly  
5 remained; (4) the defendant was found in the United States, without having  
6 obtained the consent of the Attorney General or the Secretary of the Department of  
7 Homeland Security to reapply for admission to the United States; and (5) that the  
8 defendant was an alien at the time of reentry. Ninth Circuit Model Criminal Jury  
9 Instruction 9.8.

10 In his plea agreement, Mr. Barrios-Socop admitted that he is a citizen and  
11 national of Guatemala, that he was deported on or about September 25, 2009, that a  
12 review of a fingerprint matched file would show that he has not sought or received  
13 permission to lawfully reenter the United States, that he is not a citizen of the  
14 United States, that he voluntarily entered the United States, and knew that he did  
15 not have permission . ECF No. 26 at 5-6. Mr. Barrios-Socop further admitted that  
16 he knew it was the United States when he re-entered and that he knowingly  
17 remained. ECF No. 26 at 6. Accordingly, Mr. Barrios-Socop provided sufficient  
18 evidence in his plea agreement to support a conviction for being an alien in the  
19 United States after deportation, and his challenge must be denied.

1 Mr. Barrios-Socop's other challenge in his 2255 motion is that he received  
2 ineffective assistance of counsel. As with the evidence sufficiency challenge, Mr.  
3 Barrios-Socop has not explained why the Court should reach the merits of his  
4 claim in light of his waiver of his right to bring a 2255 motion. While Mr. Barrios-  
5 Socop's waiver does allow for ineffective assistance of counsel claims, Mr.  
6 Barrios-Socop is limited to bringing claims based on evidence not in his possession  
7 at the time of the plea was entered. ECF No. 25 at 10. Mr. Barrios-Socop's  
8 motion does not identify any newly-discovered evidence. *See* ECF No. 46.

9 Even if the Court were to reach the merits of Mr. Barrios-Socop's ineffective  
10 assistance argument, the motion would still fail. In order to establish ineffective  
11 assistance of counsel, a defendant must show that the performance of his or her  
12 attorney fell below an objective standard of reasonableness and that there is a  
13 reasonable probability that, but for counsel's unprofessional errors, the result of the  
14 proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668,  
15 687-88, 694 (1984).

16 The Defendant argues that his counsel "failed to raise meritorious sentencing  
17 issues." ECF No. 46. However, the Defendant fails to elaborate and explain what  
18 those issues were. Without knowing the issues, the Court cannot determine  
19 whether counsel's performance met an objective standard of reasonableness.

1 Accordingly, Mr. Barrios-Socop has failed to establish that his counsel was  
2 deficient at sentencing.

3 Mr. Barrios-Socop also argues that counsel failed to file an appeal on his  
4 behalf. However, Mr. Barrios-Socop waived his right to appeal his conviction and  
5 sentence. ECF No. 26 at 10. Additionally, Mr. Barrios-Socop does not identify  
6 what issues should have been raised on appeal. Accordingly, the Court cannot  
7 determine whether an appeal would have changed any of the results of this case.  
8 Therefore, Mr. Barrios-Socop has failed to establish ineffective assistance of  
9 counsel.

#### 10 **Commutation of Sentence**

11 The Defendant has filed a petition for commutation of sentence with this  
12 Court. The Defendant provides no legal basis for this Court to reduce his sentence.  
13 Instead, the Defendant's application is one for clemency. Under the federal  
14 system, clemency is "exclusively executive: only the president has the power to  
15 grant clemency for offenses under federal law." *Harbison v. Bell*, 556 U.S. 180,  
16 187 (2009) (citing U.S. Const. Art. II, § 2, cl. 1). In fact, the form that Mr.  
17 Barrios-Socop filed with the Court is addressed "To The President of the United  
18 States." ECF No. 48 at 1. Additionally, the oath signed by Mr. Barrios-Socop  
19 warns him that intentional misstatements within his "petition for executive  
20 clemency" could subject him to criminal prosecution. ECF No. 48 at 6. In short,

1 this Court does not have the power to grant clemency, and Mr. Barrios-Socop  
2 should direct his petition for clemency to the President of the United States.  
3 Therefore, the Court denies the petition.

4 Accordingly, **IT IS HEREBY ORDERED:**

- 5 1. The Defendant's motion to vacate, set aside, or correct sentence, **ECF**  
6 **No. 46**, is **DENIED**.  
7 2. The Defendants motion for commutation of sentence, **ECF No. 48**, is  
8 **DENIED**.

9 **IT IS SO ORDERED.**

10 The District Court Clerk is hereby directed to enter this Order and to provide  
11 copies to counsel, Mr. Barrios-Socop, and inform the Ninth Circuit Court of  
12 Appeals that if Mr. Barrios-Socop files a Notice of Appeal, that a certificate of  
13 appealability is **DENIED**.

14 **DATED** this 14<sup>th</sup> day of August, 2013.

15  
16 s/ Rosanna Malouf Peterson  
17 ROSANNA MALOUF PETERSON  
18 Chief United States District Court Judge  
19  
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